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13 June 2016

Compliance Committee
United Nations Economic Commission for Europe
Environment and Human Settlement Division

public.participation@unece.org

To the Chair of the Committee:

Dear Madam/Sir,

Our Ref.: **DOUTRELOUX / S.A. SCIERIE CLOSE 00000012 AL/AG/2141**
Your Ref.: **ACCC/C/2015/134**

This letter relates to the case (better defined by the heading above) consisting of a Communication submitted on behalf of Mr Francis Doutreloux and Avala ASBL, a non-profit association, complaining that three specific infringements of the right of access to environmental information (exceeding the time limit and failure to supply information, even after decisions of the Walloon Region's Appeal Commission for the Right of Access to Environmental Information ['CRAIE']) represented an overall, general infringement of this right of access to environmental information (in the light of the non-binding nature of CRAIE decisions).

It seems appropriate to send you a copy of the complaint submitted by my above-named clients to the European Commission on the same subject, and of the ensuing correspondence with the European Commission, concluding with the latter's unreasonable decision to take no action on this complaint.[1]

The arguments on which my clients relied in this complaint to the European Commission were substantially the same as those in their above-mentioned (redefined) Communication and criticised the fact that the Belgian system for access to environmental information is currently ineffective, given the almost non-existent legal scope of CRAIE decisions, which carry no power of coercion, since they contain no clause conferring authority to enforce the judgment nor any other inducement (fine, coercive payment, etc.).

[1] The complaint was sent to the European Commission on 18 September 2015 (Annex 1). The Commission answered by email on 23 October 2015, informing us of its provisional decision to take no action (Annex 2). We replied to this by email on 19 November 2015 (Annex 3). On 7 April 2016, the Commission sent an email confirming its decision to take no action (Annex 4).

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In essence, the European Commission's arguments, as contained in their final decision to take no action (Annex 4) are as follows:

- an appeal before the CRAIE is merely "reconsideration" by a body "other than a court of law" as provided for in Article 6(2) of Directive 2003/4/EC (and in the second subparagraph of article 9, paragraph 1, of the Aarhus Convention) and, where this appeal is not satisfactory (because the decision is not the desired one or because it is not complied with), judicial review via an appeal before the Conseil d'Etat (Council of State) is then open to the person requesting the information;

- an appeal before the Council of State in this connection cannot be regarded as "prohibitively" expensive.

The reasoning of the European Union, which has made a definitive decision to take no action on the complaint and to admit no reply to its letter, merits several comments:

1. According to the European Commission, Belgium has transposed Article 6(1) of Directive 2003/4/EC (and therefore the first subparagraph of article 9, paragraph 1, of the Aarhus Convention) by *providing*, where a request for information has been ignored, *for* judicial review via an appeal before the Council of State. Having regard to this judicial review procedure, Belgium has also, in the aim of transposing Article 6(2) of Directive 2003/4/EC (and therefore the second subparagraph of article 9, paragraph 1, of the Aarhus Convention), made provision for reconsideration of the request by the CRAIE as a body "other than a court of law".

   However, this misinterprets the situation. Belgium has by no means "provided for" appeal to the Council of State in the specific situation where there is no response to a request for access to information. It is solely in consequence of the application of a rule on jurisdiction – which predates the body of rules on access to environmental information – that the Council of State has been entrusted with this task.

   The provision in question is Article 14(3) of the Consolidated Acts of 12 January 1973 on the Council of State [lois sur le Conseil d'Etat, coordonnées le 12 janvier 1973] ('the Consolidated Acts'), which, in general terms, covers *an authority's failure to respond*. Consequently, the CRAIE is not the "independent and impartial body other than a court of law" referred to in the second subparagraph of article 9, paragraph 1, of the Aarhus Convention, which enables reconsideration of the request in advance of review before a court of law; rather, it is clearly the "independent and impartial body established by law" before which a person who considers that his or her request for information has been ignored has access to a review procedure within the meaning of the first subparagraph of article 9, paragraph 1, of the Aarhus Convention.

2. In any event, the third subparagraph of article 9, paragraph 1, of the Aarhus Convention, which applies to decisions taken under both the first and the second subparagraphs of article 9, paragraph 1, makes these decisions *binding* on the public authority holding the information. The choice of this wording – "binding" – is totally contradicted by the fact that, in the present case, the CRAIE decisions were not accompanied by any measure guaranteeing that they would be effective (coercive payment, penalty fine, writ of execution, etc.).

Furthermore, article 9, paragraph 4, of the Aarhus Convention, which also applies to all decisions taken under the first and second subparagraphs of article 9, paragraph 1, provides that these decisions "shall provide adequate and effective remedies, including injunctive relief as appropriate" (emphasis added).

Again, in the present case, it is not clear how appeal before the CRAIE is capable of being viewed as *effective*, in the absence of any possible enforcement measure.

The applicants draw attention to the fact that, when necessary, the power of *injunctive relief* (referred to in article 9, paragraph 4) should not be confined to courts ruling in summary proceedings or hearing applications for interim relief.

3. In connection with the question of effectiveness, the communicants point out that, to the extent that appeal before the Council of State may be regarded as transposing the first subparagraph of article 9, paragraph 1, of the Aarhus Convention, it should be held that this appeal is not *effective.*

   However, the Commission did not respond to this part of the argument, which appeared on pages 3 and 4 of the complainants'/communicants' letter of 19 November 2015 (Document No. 3).

   The process of bringing proceedings before the Council of State on the basis of Article 14(3) of the Consolidated Acts takes an extremely long time – at least 2½ years.

   It is possible to embark on this Council of State procedure only after a successful outcome to review by the CRAIE (which is only completed 4 months – on average – after the request for access to information has been made). Moreover, before an application can be made to the Council of State, the recalcitrant authority must be given *formal notice to proceed*; this can be done only after expiry of the period prescribed by a CRAIE decision for the information to be supplied (in practice, 8 days after receipt of the decision, which is sometimes notified two weeks or even a month after the ruling has been given). The appeal to the Council of State can only be introduced 4 months after this formal notice has been sent. Finally, if, after a Council of State judgment, the public authority still does not implement the decision, it is necessary to initiate new proceedings, this time on pain of a financial penalty, on the basis of Article 36(1) of the Consolidated Acts. This entails allowing the administrative authority a reasonable period of time to implement the decision, sending it another formal notice and then waiting a further 3 months…

   The communicants point out that environmental information often also has a time value. Consequently, in so far as the information requested could identify a failure to comply with environmental legislation, a period of 2½ years to obtain the information would de facto entail a commensurate period of pollution to be remedied.

4. Finally, the communicants also take the view that appeal before the Council of State for the right of access to environmental information is also prohibitively expensive, especially in the light of the fact that the information is deemed to be available even without the applicant having to demonstrate an interest in obtaining it.

The procedure before the Council of State is extremely technical and could be difficult for a private individual to conduct without falling into a procedural trap rendering his or her application inadmissible at the point of introduction or even during the proceedings. Moreover, it is clear that the case preparation allowance system limits the standard case preparation allowance to €700.

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The communicants believe that it is appropriate to acquaint the Committee with the European Commission's point of view – sadly, a relatively restrictive one – on the right of access to information guaranteed by the Aarhus Convention, and with their own comments on that point of view.

A copy of this letter has of course been sent to Mr Van Der Stegen, who is representing the Belgian State in the matter of the Communication concerned.

A Word version of this document is also attached for your convenience.

Please could you acknowledge receipt of this letter?

Yours faithfully,

Alain LEBRUN
Lawyer.